

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN THE MATTER OF:) GSWA Docket 22-01
)
The Application of the Guam Solid Waste)
Authority for Review and Approval of) **ORDER**
Amendments to the Layon Landfill)
Operator Contract)
_____)



INTRODUCTION

This matter comes before the Guam Public Utilities Commission ["PUC"] upon the Petition of the Guam Solid Waste Authority ["GSWA"] for Review and Approval of Amendments to the Layon Landfill Operator Contract.¹

The Operator of the Layon Landfill is Green Group Holdings, LLC and GGH Guam, LLC (collectively "GGH Guam"). GSWA's current Operator Contract with GGH Guam will expire on September 30, 2023. The Petition seeks to extend the term of the Contract through September 2026, to implement certain cost savings through contract amendments advantageous to GSWA, and to add additional Contract provisions that will improve the efficiency of Landfill operations.

BACKGROUND

"On April 15, 2011, Gershman Brickner & Bratton Inc. (GBB), in its capacity as Receiver for GSWA, entered into a written contract with Herzog Environmental, Inc. under RFP No. SWD001-10 for the operation of the Layon Landfill. The initial term of

¹ GSWA Petition Review and Approval of Contractual Amendments to the Layon Landfill Operator Contract, GSWA Docket 22-01, filed August 12, 2022, at p. 1.

the contract was for seven (7) years, with two (2) options to renew for an additional five-year period (or 17 years total).

With the written consent of GBB, on February 27, 2013, Herzog Environmental assigned the Layon Landfill contract to GGH Guam, LLC, and Green Group Holdings, LLC.

In 2018, and prior to the expiration of the contracts initial seven-year term, GSWA and GGH Guam agreed to exercise the first of the two available five-year renewal options. This first renewal option is due to expire in September 2023.

GSWA and GGH Guam, LLC have now agreed to exercise the second five-year renewal option and to amend certain sections of the Layon Landfill contract. The exercise of the second renewal option and the amendments to the contract were approved by the GSWA Board of Directors in its Resolution No. 2022-011 on July 27, 2022.”²

The Administrative Law Judge (“ALJ”) submitted his Report herein dated August 23, 2022. The PUC adopts the conclusions and recommendations therein.³

DETERMINATIONS

A. Contract Review

² Id., at p. 2. This “Background” Section is copied verbatim from GSWA’s Petition.

³ ALJ Report, GSWA Docket 22-01, dated August 23, 2020.

PUC must review any GSWA Contract or obligation which exceeds \$750,000.00. For multi-year contracts, whether the contract exceeds the \$750,000.00 threshold for PUC review, is determined by the total estimated cost for the entire term of the contract.

The total cost of the contract from FY2011 through FY2022 is \$38,202,232.12.⁴ The total 3-year cost for the second renewal extension, if all contract amendments are approved and implemented, will be \$11,655,720.05.⁵ PUC must review GSWA's Petition for approval of the second renewal extension and the contractual amendments negotiated between GSWA and the Operator of the Layon Landfill.⁶

B. GSWA Board Resolution No. 2022-011

Pursuant to the above Resolution, the GSWA Board authorized GSWA to enter into a 3-year second contract renewal extension with Layon Landfill Operator GGH Guam, and to approve certain other cost reducing provisions and efficiency enhancements in the Contract.⁷ The Second Amendment to Assignment Agreement to operate the Layon Landfill was approved "subject to the approval of the Guam Public Utilities Commission..."⁸ The Board determined that the funding for the renewal term would derive from GSWA's Operating Fund.⁹

⁴ Agreement to Operate the Layon Landfill, April 15, 2011 – Present, submitted by Kathy Kakigi, GSWA Controller, in an email to ALJ Horecky dated August 10, 2022.

⁵ ESTIMATED CONTRACT COST – 2ND RENEWAL TERM, submitted by GSWA Admin in an email to ALJ Horecky dated August 9, 2022.

⁶ Contract Review Protocol for the Guam Solid Waste Authority, GSWA Docket 19-02 & Administrative Docket, Order, dated July 25, 2019, at paragraphs 1(f) and 4.

⁷ GSWA Board Resolution No. 2022-011, Authorizing GSWA Management to Exercise its Renewal Option and Negotiate New Terms of the Agreement to Operate the Layon Landfill, adopted and approved on 27th day of July, 2022.

⁸ Id., at p. 3.

⁹ Id., at p. 2.

The contract amendments approved by the GSWA Board are contained in the Second Amendment to Assignment Agreement to Operate the Layon Landfill, a true and correct copy of which is attached to the ALJ Report as Exhibit “1”.¹⁰

C. The Justification for GSWA’s Exercise of the Second Renewal option

GSWA seeks to renew its Agreement with GGH Guam to operate the Layon Landfill from October 1, 2023 through September 30, 2026. SECTION 2.02, Renewal Term, specifically authorizes GSWA to renew the Layon Landfill Operator Contract for a “Second Renewal Term.”¹¹ In 2017, GSWA exercised the First Renewal Term option with GGH Guam ; at that time the Receiver indicated that it was “pleased with the work” that Green Group had rendered as Operator”.¹² Earlier this year, GSWA had engaged GGH Guam in an effort to renegotiate the Contract, thus evidencing an intent to exercise the Second Renewal Term.¹³

GSWA has the legal right to exercise the second renewal term. There are several reasons it makes eminent sense for GSWA to continue with its current Operator for the Layon Landfill. GSWA is satisfied with the current Operator’s services. GGH Guam has experience in operating the Landfill since at least 2013. Under these circumstances,

¹⁰ Second Amendment to Assignment Agreement to Operate the Layon Landfill by and between Guam Solid Waste Authorities Owner, and Green Group Holdings, LLC, as Operator, attached to the ALJ Report as Exhibit 1.

¹¹ Agreement to Operate the Layon Landfill by and between Gershman, Brickner & Bratton, Inc., in its Capacity as Receiver for the Solid Waste Management Division of the Department of Public Works, Government of Guam, as Owner, and Herzog Environmental Inc., as Operator, dated as of April 15, 2011, SECTION 2.02.

¹² Letter from David L. Manning, Receiver Representative, to David Green, President, Green Group Holdings, dated April 26, 2017.

¹³ Phone Conference between GSWA General Manager Irvin Slike and Controller Kathy Kakigi, and ALJ Fred Horecky on August 17, 2022.

it would not make sense for GSWA to go through a new complicated bid procurement process for an Operator.

The Amendment to SECTION 2.02 also contains a further provision that will allow GSWA to additionally extend the Operator Contract from October 1, 2026 through September 2027. Such additional option must be agreed upon by the parties before January 31, 2026 prior to 11:59pm.¹⁴

D. Cost Reduction for the Renewal Term through Contract Amendments

The major cost component of this Contract is the “Base Operating Fee.” In the original 2011 Contract, that fee was set at \$2,871,680.72 per year.¹⁵ The fee can increase based upon the tonnage that the Operator receives and other pass-through costs such as power, water, fuel, insurance, GRT, and repairs. Each year Base Operating Fees are adjusted by an “Adjustment Factor”; the Adjustment Factor is a composite of a fixed component without adjustment and certain indices, including the Employment Cost Index, the Construction Machinery and Equipment series and Diesel Fuel series of the Producer Price Index.¹⁶

In the proposed amendment to SECTION 3.01(B) the parties agree to “immediately roll back current Based Operating Fee by the 7.323% (one-half of the most recent CPI adjustment) for the remaining unbilled months of the current contract year and would cap any future adjustment during the extension term to no more than the 5%.” A formula is provided for further adjustments of additional annual CPI adjustment which

¹⁴ Second Amendment, p. 1 (SECTION 2.02).

¹⁵ Agreement to Operate the Layon Landfill, SECTION 3.01 (B).

¹⁶ Id. at SECTION 3.01.

are over the 5% maximum. GSWA indicates that the roll back of the current Base Operating Fee by 7.323% will result in an overall reduction in cost in the amount of \$6,364,998.00 for years 2022 through 2026.¹⁷ The proposed Contract Amendment of SECTION 3.01(B) would establish significant caps for the annual CPI increase, which is of great value to GSWA in a time period of rising inflation.

Previously the Operator received an “Excess Operating Fee” after the Operator had received and landfilled a tonnage of Acceptable Waste exceeding 80,000 tons in an Operating Year. In an amendment to SECTION 3.01(C), Excess Operating Fee, the provision is amended to provide that the Operator will accept 100,000 tons per contract year under the Base Operating Fee and be entitled to receive additional compensation of \$25.00 for tonnages exceeding that level.

In accordance with SECTION 4.01, the parties agree that Operator will include Additional Cover Soil Placement on Cell 3 at no additional cost to GSWA. GGH Group agrees to putting an additional twenty-four (24) inches of final cover material on the exterior slopes of Cell 3 as the Cell is constructed.¹⁸

SECTION 4.03, Final Cover Construction, is amended whereby GGH Group agrees that placement of final cover (Cell 1 and Cell 2) should be a maximum of \$5.00 per cubic yard. The exact costs will be determined further upon evaluation by both parties. As consideration for the reduction in prices and additional services to be performed,

¹⁷ Layon Landfill Operating Contract Extension Review, Summary, provided by GSWA Controller Kathy Kakigi to ALJ Fred Horecky through email dated August 11, 2022.

¹⁸ Agreement to Operate the Layon Landfill, SECTION 4.01.

GSWA's "Convenience Termination Election in Certain Circumstances", as set forth in SECTION 13.04, "shall not be effective until September 2026."¹⁹

All of the foregoing proposed amendments are justified based upon grounds of cost reduction, enhancement of services provided by Operator, and efficiency.

E. Continuation of the Current Contract is in the Interest of GSWA and its Ratepayers

Renewal of the existing Layon Landfill Operator Contract is in the interest of GSWA and its ratepayers. The parties to the contract already have over 11 years of experience in setting up and operating the Layon Landfill. The Contract which GSWA seeks to extend sets forth a well-planned and regulated system for the operation of the Landfill. The Contract, which covers over 138 pages, establishes in detail a plan for operation and regulation of the Landfill.

For example, the Contract defines "Acceptable Waste" that the Operator may accept and dispose of at the Landfill.²⁰ It also defines "Excluded Waste", which includes Hazardous Waste and Medical Waste.²¹ The Base Operating Fee and other pass-through Costs which the Operator is entitled to are specified in a detailed formula.²² The Base Operating Fee and Excess Operating Fees are adjusted annually through various CPI's indexes.²³ There are requirements for soil cover for the various Cells, and the Operator is required to submit a "cover soil management plan" that

¹⁹ Id., at SECTION 4.03.

²⁰ Id., at SECTION 1.01.

²¹ Id.

²² Id., at SECTION 3.01.

²³ Id., at SECTION 3.05.

complies with the Landfill Permits.²⁴ Issues are addressed concerning Cell Construction and Future Site Development.

Management and operation of the plant are obligations of the Operator, and such duties are well defined.²⁵ The Operator is required to operate and maintain the Layon Landfill in compliance with Landfill Permits, including the Site Specific Landfill Operations Plan and Applicable law.²⁶ However, previously the Receiver, and now GSWA, is responsible for operating the scales in determining what volume of waste is brought to the Landfill.²⁷ The Operator is required to screen all Solid Waste entering the Layon Landfill in accordance with permits, applicable laws and protocols.²⁸

The Operator maintains, at its own expense, all properties, facilities and equipment used in providing service under the Agreement.²⁹ The Operator supplies all personnel necessary to provide services at the Landfill.³⁰ The Operator maintains the scales used by GSWA to accurately weigh solid wastes.³¹ The Operator also is required to prepare and submit to GSWA monthly, quarterly and annual reports detailing activities related to services performed under the Agreement.³²

There are many reports, audited financial reports and other reporting requirements “associated with the Layon Landfill as required by the Landfill Permits

²⁴ Id., at SECTION 4.01.

²⁵ Id., at SECTION 5.01.

²⁶ Id., at SECTION 5.05.

²⁷ Id.

²⁸ Id., at SECTION 5.05(G).

²⁹ Id., at SECTION 5.06.

³⁰ Id., at SECTION 5.08.

³¹ Id., at SECTION 5.12.

³² Id., at SECTION 5.15.

and other Applicable Laws”.³³ The Operator is required to “establish and implement the procedures governing access to the Landfill.”³⁴ It is responsible for conducting various inspections and providing access to authorized government entities and insurers.³⁵ The Operator is responsible for cleanup upon expiration or termination of the Agreement.³⁶ The Operator must cover all waste at the end of each working day.³⁷

The Operator is required to provide various types of insurance, including comprehensive general liability, automotive liability, workers compensation, business interruption, and pollution liability, etc.³⁸ There are various “indemnity” provisions which require the Operator to assume all risk of loss or injury to property of persons arising from any of its operations and indemnifies all parties from claims, suits, and judgements.³⁹ The provisions broadly protect GSWA and its ratepayers. Under the Contract, there is also a separate “guarantor”, Green Group Holdings, LLC, who agrees to be liable for financial obligations of the Operator.⁴⁰

The Operator is required to maintain, throughout the terms of the Agreement, a performance bond in the amount of \$5,000,000.⁴¹ There are default provisions by which GSWA can terminate the Operator in the case of failure of performance.⁴² Liquidated damages can be assessed against the Operator in the event of a failure to comply with

³³ Id., at SECTION 5.24.

³⁴ Id., at SECTION 5.27.

³⁵ Id., at SECTION 5.30

³⁶ Id., at SECTION 5.30(D).

³⁷ Id., at SECTION 5.47.

³⁸ Id., at SECTION 9.01.

³⁹ Id., at SECTION 9.03.

⁴⁰ Id., at SECTION 10.01.

⁴¹ Id., at SECTION 10.02.

⁴² Id., at SECTION 13.02.

performance or other requirements or standards in the Agreement.⁴³ Such damages can be as much as \$1,000 per day depending upon the type of failure of performance.⁴⁴

The above explanation only covers in a general way some of the very specific requirements of the Contract. It is in the interest of GSWA and its ratepayers to maintain the present Contract in effect.

ORDERING PROVISIONS

After careful review and consideration of the above determinations, the Petition of GSWA for Review and Approval of Amendments to the Layon Landfill Operator Contract, the ALJ Report, and the record herein, for good cause shown, and on motion duly made, seconded, and carried by the undersigned Commissioners, the Guam Public Utilities Commission **HEREBY ORDERS** that:


1. The extension of the Operator Layon Landfill Contract with GGH Guam, from October 1, 2023 through September 30, 2026, is hereby approved. The parties may further extend the renewal period to September 30, 2027, in accordance with the amendments to SECTION 2.02 of the Contract. If the Contract renewal period is further extended, GSWA must seek prior review and approval of the PUC.
2. GSWA is authorized to expend up to the amount of \$11,655,720.05 for the extension of the Contract for fiscal years 2023, 2024, and 2025.

⁴³ Id., at SECTION 15.02.

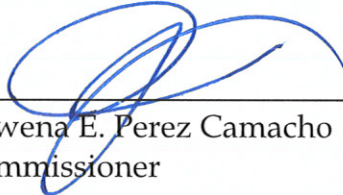
⁴⁴ Id., at SECTION 15.03.

- [SIGNATURES TO FOLLOW ON NEXT PAGE]**

Dated this 29th day of September, 2022.

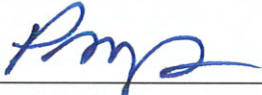


Jeffrey C. Johnson
Chairman

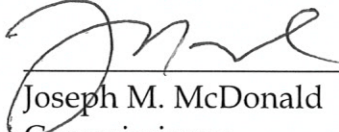


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